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IN THE

Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

APPELLEES GLORIA PERSONHUBALLAH AND JAMES FARKAS REPLY BRIEF ON STANDING

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APPELLEES PERSONHUBALLAH'S AND FARKAS'S REPLY BRIEF ON STANDING

Appellants' argument they have standing to appeal because "the judgment below inflicts 'direct injury' on at least one of them," Appellants' Brief Regarding Standing ("Appellants' Br.") 1, should be rejected for the following reasons.

I. ARGUMENT

It is well settled that standing is determined when a litigant first seeks an audience in federal court. *See, e.g., Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1157 (2013) ("[W]e assess standing as of the time a suit is filed. . . ."); *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 n.5 (1992) ("[S]tanding is to be determined as of the commencement of suit. . . .") (plurality op.).

Focusing on that snapshot in time enforces the mandate that federal courts only review cases pursued by litigants who are likely to suffer concrete, particular, and imminent harm. Thus, "[i]t cannot be that, by . . . participating in the suit, [parties] . . . retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset." *Lujan*, 504 U.S. at 570 n.4 (plurality op.). *See also Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1037-38 (8th Cir. 2000) (finding events occurring after complaint filed not relevant to whether plaintiff had standing) (citing *Lujan*, 504 U.S. at 568); *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("It is not enough for [a litigant] to attempt to satisfy

the requirements of standing as the case progresses . . . . standing must be satisfied from the outset[.]").

Yet, Appellants admit that the trigger for their claimed injury was the Panel's final judgment, *see* Appellants' Br. 1, not a concrete, imminent injury cognizable at the time that they intervened. Viewed from that vantage point, as it must be, it is clear that Appellants' claimed injury was too speculative to support Article III standing and, indeed, still is.

ASARCO Inc. v. Kadish does not hold otherwise. There, standing was assessed when respondent-intervenors "[sought] entry to the federal courts *for the first time* in the lawsuit." 490 U.S. 605, 618 (1989) (emphasis added). That this was after the lower court issued its judgment was a consequence of the unusual posture of the case. The respondents had been party to a *state* court action that culminated in a state supreme court judgment. *Id.* at 610. The suit was initially brought by taxpayers and a teachers association, who could not have met Article III's requirements for standing had they filed in federal court. *Id.* at 614-15 (plurality op.). Thus, when the case arrived on the Court's doorstep via respondents' petition for certiorari, with it came a jurisdictional question "of some theoretical import, though infrequent in occurrence." *Id.* at 612. Specifically, the Court had to decide, "whether we may examine justiciability at this stage because the [state] courts heard the case and proceeded to judgment, a judgment which causes concrete injury to the parties *who seek now for the first time* to invoke the authority of the federal courts in the case." *Id.* (emphasis added).[1] In the end, the Court cabined

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[1] The Court repeatedly emphasized that the respondents had not previously been in federal court. *Id.* at 613 ("[A] judgment which causes concrete injury to the parties who seek now for the

its holding to the case's peculiar circumstances, concluding only that, "[w]hen a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue . . . [in] federal court[], we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met." *Id.* at 623-24.

By contrast, this is not a case in which review is sought of a state court judgment, nor is Appellants' jurisdictional statement their first entreaty to the federal courts. But even more fundamentally, to find that Appellants have standing based on the Panel's "'adverse' 'adjudication of legal rights,'" Appellants' Br. 8, would eviscerate the requirement that litigants show, as of their first filing in federal court, a concrete and particularized injury to a legally protected interest that is "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotations omitted).

Moreover, the *ASARCO* respondents were holders of mineral leases of state lands, the legality of which were directly at issue in the case below. 490 U.S. at 609-10. Thus, in opposition, the government did *not* argue that respondents lacked a legally cognizable injury from the outset, only that the case was not justiciable by the Court because the plaintiffs could not have filed in federal court. Indeed, the government

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first time to invoke the authority of the federal courts in the case . . ."), 618 ("[P]etitioners . . . seek entry to the federal courts for the first time. . . ."), 619 ("As the parties first invoking the authority of the federal courts. . . ."), 624 ("Because they are the parties first invoking the authority of the federal courts in this case . . . .").

affirmatively argued that the respondents were "free 'to bring a declaratory judgment action *in federal court' raising these same claims*." *Id.* at 620 (quoting Brief for United States) (emphasis added).[2]

In contrast, Appellants' specific claim to a legally cognizable injury remains strikingly vague. Remarkably, at one point they appear to assert that their injury arises because the Panel is likely to move black voters into their districts. *See* Appellants' Br. 9 (arguing the decision below "requires a remedy that will harm at least one Appellant" because "[a]ny remedy must . . . move [black] voters *out* of District 3 and into one or more of the surrounding . . . districts, and an equal number of non-black (and largely Republican) voters into District 3"). Not surprisingly, Appellants fail to cite any cases suggesting that a politician's fear that voters of a certain race may be moved into his district is a legally cognizable injury entitling him to federal court review.

One hopes that what Appellants *meant* to say was, not that they are injured when black voters are moved into their district, but rather that, if enough Democratic voters are moved into their district, they may ultimately *lose their seat* when they run for reelection. But even assuming that such an injury is theoretically cognizable, it cannot support Article III standing here because it is highly speculative. Several things must happen before it could come to pass: the Panel must approve a map that decreases the Republican vote share in at least one of Appellants' districts enough to create a meaningful threat to an

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[2] The Court rejected this argument based on the case's particular posture, finding it would force the respondents into federal district court to obtain review of a state court decision in violation of the *Rooker-Feldman* doctrine. *Id.* at 622-23.

Appellant's reelection. Then, the Appellant has to win a primary election against any challengers (Cantor faltered here in 2014). Then, the Appellant has to lose in the general election to a Democrat *and* be able to demonstrate that the loss was due, not to the independent ever-shifting nature of the electorate, or to votes by swing voters—or even to scandals of the Appellant's own making—but to the Panel's adoption of a map that swapped some Democrats for Republicans in the Appellant's district. Appellants are unlikely to *ever* be able to make that showing, but they certainly have not done so on the record here.[3]

The remaining cases that Appellants rely upon are similarly inapposite. Appellants' reliance on *Meese v. Keene*, 481 U.S. 465 (1987), for example, ignores that it was a First Amendment case, and the reputational injury that the Court found supported the appellee's standing was of a sort long recognized as legally cognizable. *See id.* at 475-76. Indeed, based on the Court's First Amendment precedent, the appellee's claim that the government's classification of films that appellee wished to disseminate as "political propaganda" would damage his reputation was likely *on its own* sufficient to confer Article III standing. Nowhere does the opinion hold that appellee's additional claim that it threatened his political career was necessary or

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[3] As Appellants appear to recognize by asserting (without record citation) that "[a]ll eight Appellants currently serving in Congress intend to seek reelection in 2016," Appellants' Br. 4, their claimed injury only materializes if they run for reelection under a yet-to-be-adopted remedial map. Thus, the Panel's decision does not endanger their seats *as currently occupied*, but rather Appellants claim it *could endanger their chances of reelection* to those seats in 2016. None of the cases cited by Appellants support their argument that this sort of highly conjectural injury is cognizable for Article III standing purposes.

central to his standing. *See id.* (discussing precedent "in which we did not question that petitioner had standing to challenge a statute requiring . . . all 'communist political propaganda' originating abroad [be held] and not release[d] . . . to the addressee unless that individual made a written request" to assert First Amendment claim). Moreover, the claimed injury to the appellee's reelection chances was part and parcel to the claimed reputational harm. *Id.* at 476 ("[E]njoining the application of the words 'political propaganda' to the films would at least partially redress the *reputational* injury of which appellee complains.") (emphasis added).[4]

Even if a First Amendment injury could confer standing to defend against a racial gerrymandering claim (and Appellants cite nothing that would support such a conclusion), Appellants do not and cannot claim that the Panel's decision causes them any reputational harm, making their reliance on *Meese* inapposite. And, even if *Meese* could be read to permit a party to proceed in any type of case based on threatened injury to a chance for re-election (which, on its face, it does not), Appellants have failed to make any evidentiary showing that they are likely to suffer such an injury in *this* case. *Cf. id.* at 473-74 (finding appellee submitted "uncontradicted" evidence law was likely to cause him

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[4] The Board of Elections reads *Bond v. United States*, 131 S. Ct. 2355 (2011), too broadly, essentially asserting that, if Appellants can cobble together *some* claimed injury, they could have standing (on the appropriate record) to defend against any challenge, both in the first instance and by seeking review of this Court. Bond was charged with a federal crime and the judgment that she sought to appeal was *her conviction of that crime*. *Id.* at 2360. She indisputably had Article III standing to avail herself of a federal judicial audience to begin with. In contrast, Appellants lacked standing from the start of this litigation.

cognizable injury, including "detailed affidavits . . . describing the results of an opinion poll and . . . containing the views of an experienced political analyst, supporting the conclusion that his exhibition of films that have been classified as 'political propaganda' . . . would substantially harm his chances for reelection and would adversely affect his reputation in the community").

Davis v. FEC, 554 U.S. 724 (2008), similarly involved a well-established First Amendment injury not shared by Appellants. There, a candidate challenged the disclosure requirements for self-financing candidates imposed by federal campaign finance law. *Id.* at 730. Failure to comply could result in civil and criminal penalties. *Id.* The Court found the candidate faced a cognizable injury-in-fact "when he filed suit" and "declared his candidacy and his intent to spend more than $350,000 of personal funds in the general election campaign whose onset was rapidly approaching." *Id.* at 734. Appellants' position, at the risk of understatement, is not remotely similar.

Clinton v. City of New York also offers no support for Appellants. At issue there was the constitutionality of the Line Item Veto Act. 524 U.S. 417, 420 (1998). The appellants included state entities that, as a direct result of the exercise of the veto, owed $955 million to the United States, which "immediately and directly affect[ed] the borrowing power, financial strength, and fiscal planning" of those entities, *id.* at 422, 431, and a cooperative of farmers who similarly suffered immediate injury when a tax benefit it had concrete plans to use was vetoed. *Id.* at 432.

By contrast, Appellants' claims are ill-defined, and, worse, would require a highly-improbable chain of events. Indeed, assuming that their claim of "injury"

is cognizable under any circumstances, it is nonjusticiable for the reasons discussed in *Allen v. Wright*, 468 U.S. 737 (1984), *abrogated on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), in both of which the Court found the claimed injuries too attenuated to support Article III standing. *See Clinton*, 524 U.S. at 434 n.23 (discussing cases).[5]

Appellants' reliance on *Swann v. Adams* also fails. *Swann* involved a challenge to a legislative map that contained substantial district-to-district population deviations. 385 U.S. 440, 442-43 (1967). In a population deviation challenge, any voter from a district that is overpopulated and underrepresented has standing to challenge an entire districting plan. *Baker v. Carr*, 369 U.S. 186, 205-06 (1962). *See also Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[A]n individual's right to

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[5] In *Allen*, the Court found the injury of "children's diminished ability to receive an education in a racially integrated school" could not support standing because the nexus between the challenged conduct and the injury was speculative at best, raising questions about how the policy was likely to impact behavior of schools and parents in reality, the scope of that impact, and "whether, in a particular community, a large enough number of the numerous relevant . . . officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." 468 U.S. at 756-58. In *Simon*, the respondents argued they were injured by a tax ruling that "'encouraged' hospitals to deny services to indigents." 426 U.S. at 42. The Court found this to be too speculative, explaining: "[I]t does not follow . . . that the denial of access to hospital services in fact results from . . . [the] Ruling, or that a court-ordered return . . . to [the] previous policy would result in . . . respondents' receiving the hospital services they desire"; the injury may instead independently "result from decisions made . . . without regard to the tax implications." *Id.* at 42-43.

vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living [i]n other parts. . . ."). In contrast, in racial gerrymandering cases, the injury is *district*-specific, and only the voters who reside in a challenged district suffer from legally cognizable injuries, i.e., that of being unconstitutionally classified based on their race without compelling legal justification. *See* Supp. Br. for Voter Appellees on Standing 8-10.

Moreover, the *Swann* Court found that the district court had "treat[ed] the [voter] appellants as representing other citizens in the State," to include voters living within the malapportioned districts. *Id.* at 443. The Republican Members who press this appeal can make no claim that they have either sought to, or the Panel has ever treated them, as representing the interests of either CD3's voters or its representative, Democrat Bobby Scott.

Appellants' reliance on *FEC v. Atkins* is so misplaced as to be perplexing. There, the Court found certain voters had standing to obtain review of a FEC decision dismissing their complaint that AIPAC was a "political committee" and thus subject to registration and reporting requirements. 524 U.S. 11, 13-14 (1998). Appellants were "voters with views often opposed to those of AIPAC," *id.* at 15, and the Court held that, given that there was a statute that was meant "to protect individuals such as respondents from the kind of harm they say they have suffered, i.e., failing to receive particular information about campaign-related activities," *id.* at 22, the FEC's argument that the voters lacked standing was a non-starter, *see id.* at 26.

II. CONCLUSION

Appellants' argument that they, members of Congress representing districts *other than* CD3, have standing to defend this litigation, while voters outside CD3 who share their "injury" could not obtain review of the same, is fundamentally at odds with "'[t]he irreplaceable value of the power articulated . . . [in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803)],'" which "'lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action.'" *Raines v. Byrd*, 521 U.S. 811, 829 (1997) (quoting *United States v. Richardson*, 418 U.S. 166 (1974) (Powell, J., concurring)). "'It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.'" *Id.*

"In . . . light of [the] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere," the Court has long recognized it must "put aside the natural urge to proceed directly to the merits . . . and to 'settle' it for the sake of convenience and efficiency" and must "carefully inquire as to whether [litigants] have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 820.

As discussed, Appellants do not and cannot make this showing. Appellees respectfully submit that this appeal should be dismissed for lack of jurisdiction.

Respectfully Submitted,

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